Office Memorandum • UNITED STATES GOVERNMENT

TO : MEMORANDUM FOR THE RECORD DATE: 23 May 1952

25X1 FROM : [redacted]

SUBJECT: Some Legal Problems Relating to the CIA Corporation

SUMMARY CONCLUSIONS:

A) There is some basis in law for general exemption of CIA corporations from government-wide restrictions.

Two Alternative Lines of Approach.

(1) TOTTEN v. U.S., 92 US 105, 23 L. ED. 605 (1875) recognizes expenditure of contingent funds for covert intelligence activity without explicit congressional authorization. Thus, the CIA Act seems not to have been required for deeply covert activities and should not be construed as a limitation on these activities. The CIA corporation only operates with unvouchered (contingent) funds in the covert field and thus no government-wide restrictions apply to its activities.

(2) Government corporations are considered separate legal personalities for some purposes. The CIA corporations--because of their many unusual features--might be considered completely non-governmental and so not restricted by government-wide legislation.

B) There is considerable basis in law and policy for exempting certain phases of CIA corporate activity from government-wide restrictions.

Four Lines of Approach, Not Necessarily Alternative, are Indicated.

(1) The Comptroller General does not consider CIA's broad grant of authority to extend to ordinary administrative problems which confront the ordinary government agency. However, where the activities of particular employees are deeply covert and where the CIA corporate employer is itself in a deeply covert field, then a possible exemption from all government-wide restrictions exists. The basis for this limited exemption would be that these CIA corporate activities are not ordinary administrative problems and so within the broad CIA grant of authority.

(2) Government-wide restrictions do not apply to CIA corporate activities where it is against the interest of security. This is the most narrow view of CIA authority but its conclusion can be reached realistically without reference to the statutes and the cases: this attitude is the one most likely to be approved by a congressional committee investigating CIA activities.

(3) Certain government-wide restrictions may not apply if peculiar requirements are met. For example, if CIA shipping corporations adopt an odd agreement with their ships' masters, and an unusual Attorney General's opinion is followed, seamen on CIA ships will not be covered by the Federal Employees' Compensation Act.

(4) If government-wide restrictions apply to CIA corporations, inter-Agency accords may often solve the security problems.

ASSUMPTIONS:

There is no public law on the subject of government cover corporations. If the process of analogy--sometimes far-fetched and extreme--is not used, then we must merely list the variety of restrictions generally applicable to government corporations. The assumption of this memorandum is that the problem presented is: "Is it possible for the CIA corporation to avoid the imposition of government-wide restrictions normally applicable to government corporations?" The solutions presented are in the nature of arguments--most unorthodox, as befit the problem. The orthodox view is that of the Comptroller General: the extraordinary powers granted to CIA do not apply "to the normal administrative or operating problems which confront the ordinary government agency." B-106516, November 21, 1951. If the Comptroller General's opinion applies to the operating problems of CIA corporations--then we must again list the variety of government-wide restrictions as applicable to CIA corporations. However, even the Comptroller General must recognize that the broad authority of CIA is to be exercised in order to protect sources of intelligence from unauthorized disclosure.

I. The functions of the CIA corporation.

While clandestine operations of the temporary variety may best be accomplished through [redacted] cover, the corporation device is necessary for long-term missions. It provides a separate legal personality, a limitation to the liability of officers and directors, and maintenance of control through declarations of trust or blank stock shares. It serves as a continuous base for covert operations. 25X1

II. The authority to create the CIA corporation.

A. It has been traditionally accepted that the United States Government has the power to create corporations to carry out its business. This was a holding of McCulloch v. Maryland, 4 Wheaton 316, (US 1819) in which it was said "let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are plainly adapted to this end, which are not prohibited, but consistent with the letter and the spirit of the Constitution, are constitutional." However, the Government Corporation Control Act of 1945 explicitly states that:

"no corporation shall be created, organized, or acquired on or after December 6, 1945 by an officer or an Agency of the Federal

> Government or by any Government corporation for the purpose of acting as an Agency or instrumentality of the United States, except by an act of Congress or pursuant to an act of Congress specifically authorizing such action." 31 USCA 869(a).

This act also states that no wholly-owned Government corporation shall "continue after June 30, 1948". However, there is a proviso:

> "that prior thereof, any such corporation may be reincorporated by an act of Congress for such purposes and term of existence of such powers, privileges and duties as set by such act, including the power to take over the assets, assume the liabilities of its respective predecessor corporations." 31 USCA 869(b).

B. If the CIA corporations are covered by the Government Corporation Control Act then their creation in all cases is illegal.

The constitutionality of prospective legislation of this type is always at least doubtful. For in this way one session of Congress can usurp the constitutional authority of a future session of Congress. On the other
FOIAB5 hand, a Government agency should not disregard legislation it considers unconstitutional. Also the prohibition can be construed as running only against a government corporation "acting as an agency or instrumentality of the United States." Thus a cover corporation, which is holding itself out
OGC as a private proprietary facility, should not be included therein.

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F. Heretofore, government corporations have not been established except by explicit congressional authorization. The Reconstruction Finance Corporation was incorporated by a direct act of Congress. (15 USCA 601 ff) The stock of the Panama Railroad Company was wholly purchased by the government under an explicit congressional authorization, 48 USCA 1301 ff. The United States Shipping Board Emergency Fleet Corporation was incorporated under a state incorporation statute by a government agency acting under an explicit congressional grant of authority. Act, September 7, 1916, Chapter 451, Section 11, 39 Stat 731.

G. Thus, although explicit congressional authority is customarily required for an agency to incorporate under a state incorporation statute or by issuance of a charter from it, the authority to create CIA corporations stems from implicit authority granted in several statutes.

III. The Constitutional Argument

A. In Totten vs. United States (92 US 105, 23 L. Ed. 605 (1875)), the plaintiff was hired by President Lincoln to spy behind the Confederate lines during the Civil War. He was promised $200 plus expenses by the President for his services. Totten performed his duties well, submitting reports to his superior from time to time, and was reimbursed his out-of-pocket expenses. After the war Totten sued the United States on his contract for the promised $200. The Court of Claims split on the question of whether the President had the authority to commit the government for this type of expenditure without explicit congressional authority and the case was certified to the Supreme Court. Mr. Justice Field, in delivering the unanimous decision of the Court, found no difficulty in the Court of Claims' problem. This was the kind of service that the President could contract for in wartime, under his constitutional grant of authority, and the money for the purpose could be obtained from contingent funds. However, the court did not have jurisdiction to entertain this type of suit for the fact of the contract was confidential in nature.

B. It has been well established--before and since Totten--that certain phases of the operation of each of the three branches of the government cannot be questioned in any other place. Within this limited sphere, each branch is supreme under the constitution. Thus the Attorney General may refuse to allow a congressional committee to see FBI reports relevant

to its legislative inquiry. The reason given (citing Totten) is that these reports are executive in nature. Congressional committees cannot order their production. It must be assumed Congress cannot directly enact a statute forcing the Attorney General to reveal them to the legislature. And it must be assumed that they cannot be subpoenaed by the courts. 40 Op. Atty. Gen. 45 (1941)

C. The original jurisdiction of the Supreme Court is another constitutional grant which neither the Congress (nor the court nor the executive) can limit. Marbury vs. Madison, 1 Cranch 137 (U.S. 1803). Punishment for contempt of Congress, on the other hand, is peculiarly a judicial function, according to the constitution, and it cannot be assumed by the Congress. Kilbourn vs. Thompson, 103 U.S. 168 (1881).

D. Thus the Executive has the right, at least in time of war, to hire Totten-type people to do Totten-type jobs even without the CIA Act of 1947, Public Law 110. According to Totten, which has been followed and expanded through the years by the Attorney General, this is the implementation of a constitutional grant to the Executive. 40 Op. Atty. Gen. 45 (1941)

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G. If this argument holds, then congressional restrictions apply only to the non-Totten type of operation. Congress cannot restrict that which is completely outside its sphere and possibly it does not have the authority to limit appropriations by unconstitutional conditions. Congress has the power to refuse to appropriate funds for contingent expenses of this type but its authority for limiting the constitutional authority of a co-equal branch of government is doubtful. Thus, the Totten-type of operation is not covered by any Congressional legislation. This is only a limited part of the CIA mission and it does not include an ordinary administrative job in a completely overt phase of CIA operation. Dual compensation prohibitions, thus, do not apply to the Totten-type mission. Public Law 53 was

meant to extend CIA recruitment to fifteen retired officers in that phase of CIA operations--completely overt in nature and with the employee an overt employee of CIA. Thus no more than fifteen retired officers are excepted from the dual compensation prohibitions in the overt phase of CIA operations. However, in that phase of CIA operation where no Congressional authority was needed to engage in the activity originally and funds of the United States could be pledged for the activity, the government-wide restrictions are not applicable. Totten vs. United States, supra. President Lincoln, it seems, could have hired Totten as a spy even if he did come within the existing dual compensation prohibition. Lincoln received his authority for this from the highest source possible--the constitution. In Totten vs. U. S., supra, the Supreme Court did not cite any one particular clause of the Constitution. However, the following clauses are those evidently relied upon:

> Article II, Section 1: "The Executive Power shall be vested in a President of the United States."
>
> Article II, Section 2: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual service of the United States...."

H. The relevant income tax provision (§116 of I.R.C.) is also not applicable. The Bureau of Internal Revenue acts under a congressional mandate and does not apply beyond the authority of Congress to restrict CIA operations. It could be argued that, although the Totten-type operation is secret, payment for the operation is still income within the contemplation of the Internal Revenue Code. The courts do not have jurisdiction over a prosecution for evasion of tax based on this income. This type of income cannot be taxed although the fruits of illegal gambling operations may be taxed. The illegal gambler is in a business that can be regulated in many ways by the federal government; a prohibitory license tax may be imposed upon interstate gambling operations and the personal income of gamblers from gambling may be taxed. However, the Totten-type income is not subject to tax as this kind of executive operation is not subject to congressional restriction.

I. It might be argued that the function of the Totten-type employee is secret, and peculiarly executive, but the fact of the income to the individual does come under the purview of the Internal Revenue Code. However, under the Totten case the fact of the contract is a secret of state. Mr. Justice Field called it confidential in nature and not to be questioned in any way by any of the other co-equal branches of government.

J. The same argument would apply to any of the other government-wide restrictions: the Federal Employees Liability Act (P.L. 267), the government annual leave and sick leave regulations (under P.L. 233) and the Civil Service Retirement Act (under P.L. 411).

K. Thus, under Totten vs. United States, 92 U.S. 105, 23 L. Ed. 605 (1875), Marbury vs. Madison, 1 Cranch 137 (U.S. 1803), Kilbourn vs. Thompson, 103 U.S. 168 (1881), 40 Op Atty Gen 45 (1941), it is well settled that certain activities of each of the three co-equal departments of government cannot be questioned in any other place. The President may, under the constitution, pledge the credit of the United States without any grant of authority from Congress, for spying activity in time of war. The courts do not have jurisdiction to entertain actions on these contracts or consider them in any way without the consent of the Executive. The very existence of these contracts is secret. Thus, Congress has not and cannot restrict these deeply covert activities of CIA and no restrictive legislation (dual compensation prohibitions, exception to income tax exemption under §116, I.R.C., etc.) applies. The CIA corporation only operates in the covert area.

IV. The Constitutional Arguments as a Personal Defense.

A. When the Executive desires to delegate the defense, the assumption of Part III is that the constitutional argument should not apply except to persons (whether CIA corporate employees, agents, or independent contractors) who are analogous to the traditional secret agent under deep cover. Assuming that this defense can be used by the Government, to what extent can this defense be used by the individual? Thus, if the dual compensation prohibition is held not to apply to Totten persons, then to what extent can a Totten-type person use this defense when he is sued for the amount of retirement pay received if the executive desires to delegate the defense of secrecy to him? Then he stands in the position of the Agency and as its agent, bars any investigation of his contract.

It could be argued that this defense, peculiarly executive, cannot be delegated, and whereas the dual compensation prohibition runs against both the employing agency and the employee, the employee cannot take advantage of the defense. On the other hand, the reason for the defense being interposed is the secret nature of the transaction and that it is against the interests of national security to publicize the contract. Thus, assuming the agent is acting within the Agency authority, then it seems that the defense can be delegated.

B. When the area has been desensitized and the project is no longer of interest or for any other reason, the Director has made the determination that it is no longer in the interest of national security that the employment contract be held secret, then can the person use the security defense to prevent an investigation of the employment contract? It would seem not, even though it could be argued that there was reliance by the employee on the good faith of the Agency. However, in all the situations that I have investigated, witting employees with obligations stemming from Government-wide laws, are informed by the Agency of their obligations. Of course, the Agency very often puts a person into a position where other branches of the Government will find it very difficult to enforce their regulations without the cooperation of the person. However, if a person desires to try to evade a law thinking that CIA will continue a cover that prevents discovery, it is difficult to sympathize with his reliance argument.

The situation is a little more complex in the case of the unwitting employee. Here might be a person subject to various regulations because of his employment by the Government (as, for example, exception from Section 116 of the I.R.C. exemption, dual compensation prohibition) who, for security reasons, has not been notified that he is an employee of the Government. Now when the area is desensitized and the project is no longer necessarily secret, this now witting person might find himself subject to criminal prosecution or, at least, subject to the penalties under the Internal Revenue Code. If the Executive does not desire to delegate a defense, then unless the statutes can be construed so as to exclude unwitting employees, the employee would seem to be covered. There is here, at least, a moral obligation on the part of the Agency to continue this person's immunity.

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V. The CIA corporation as an ordinary government corporation.

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[redacted] Thus the usual negotiable instrument rules apply. Bank of the United States v. Donally, 8 Pet. 361, US 1834. The bankruptcy priorities of the United States Government do not extend to the corporations. United States v. Wood, 290 FED 109, CCA 2nd 1923. The usual procedural rules apply. United States Emergency Fleet Corporation v. Bank Line Company, 22 FED 2nd 430, D.C.N.D. Cal. 1927. The ordinary carrier rules have been held to apply to corporation contracts of carriage. Inland Waterways Corporation v. Hallet and Carey Company, 52 FED 2nd, 13 CCA 8th, 1931.

On the other hand, the unanimous Supreme Court has held in a leading case that the United States Shipping Board Emergency Fleet Corporation is a department of the Government within the meaning of the Post Roads Act of 1856 (47 USCA 3) and so entitled to the reduced Government rate on telegrams and cablegrams.

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Even if the Constitutional Argument (paragraph 4 et seq. this paper) does not hold or if it is not applied for reasons of policy, still the CIA corporation may be exempt wholly or in some of its phases from government-wide restrictions. [redacted]

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However, often a government-wide restriction or prohibition runs against an individual receiving amounts from the government. If the Director does not have the authority to waive a government-wide restriction running against persons, then the Director has very limited authority.

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If the Agency does desire to waive this immunity, the person coming within the government-wide restrictions cannot, it seems, claim reliance on the original CIA granted immunity.

B. A Government corporation as an independent legal personality - Overt Government corporations have for many purposes been treated as an entity separate from the Government. (See A. under the CIA corporation as an ordinary government corporation) The CIA corporation by its very nature is different from the ordinary government corporation.

1. Legal title to the controlling stock may be held by persons not employed by the Government.

2. Control of the corporation by the Government is maintained through covert means.

3. Corporate managers may take their authority from classified contracts with the Agency.

4. The overt function of the corporation is secondary to the real interest of the Government in the corporation.

5. Often employees are, for security reasons, kept unwitting.

6. The corporation does not take advantage, for security purposes, of beneficial laws and regulations of the Federal Government, state governments, and foreign governments which relate to Government corporations.

7. The purpose of the CIA corporation is not to act a) as a means of regulating private enterprise, or b) as a government facility to perform certain proprietary functions which private enterprise cannot perform as cheaply. (as TVA production of fertilizer)

8. No oath of office is required of officers or employees of CIA corporations for security reasons. 5 USCA, Section 16 states

> that this oath of office is "to be taken by any person elected or appointed to any office of honor or profit, either in the civil, military, or naval service except the President of the United States...."

Except that the overt function of the CIA corporation is secondary to the real interest of CIA in the corporation, all facts point to the CIA corporation as a legal entity, separate from the government. The corporation is created under implicit congressional authorization, rather than the customary explicitly detailed congressional enabling act. Thus, possibly, the CIA corporation, as a separate entity, might be completely immune from congressional regulations affecting employees of the United States Government.

However, it could be argued that while the functions of non-CIA government corporations are usually in fields traditionally reserved for private enterprise, CIA corporations operate in a field (intelligence) traditionally considered a part of government. Thus, the argument would continue, CIA corporations cannot be treated as non-governmental legal entities.

C. Can the CIA corporation sue and be sued? - Corporations wholly-owned by foreign countries are held to be citizens of the American state of incorporation and "invested with the right to sue and be sued in the courts of the county". Amtorg Trading Corporation v. United States, 71 F 2d 524, 528) (Ct. Cust. & Pat. Apps., 1934). This has been applied by the courts to United States Government corporations also. Thus, the Panama Railroad Company can sue and be sued without an express waiver of sovereign immunity from its sole stockholder, the United States. Panama Railroad Company v. Curran, 256 F 768, CCA 5th, 1919. Even if the government corporation acts ultra vires it cannot successfully plead its status as an agent for the Government as a defense against liability for its tortuous act. Cf. US Shipping Board Emergency Fleet Corporation v. Harwood, 32 F 2d 680 (CCA 2d 1929). In this case, if an ultra vires corporate contract is not classed as a tort, a Government corporation can make contracts where it is principal and bind only itself.

It has been held that the United States can sue to recover on the contracts of its proprietary corporations. Erickson v. United States and United States Spruce Production Corporation, 264 US 246 (1924), US v. Skinner and Eddy Corporation, 35 F 2d 887 (CCA 1929) Cert. dismissed 281 US 779 (1930). In some of the cases holding this the legal title to the property involved in the suit was held by the United States and not the corporation and so the United States was the real party in interest. But in all the cases the corporation even if it was contracting in its own name, was acting as an agent of the United States, a disclosed principal. However, the view has never been expressed by the courts that the United States has standing to sue because the corporation is an actual part of the Government. Some cases involving state-owned corporations have held as a matter of broad

public policy that only the appropriated capital of a state-owned corporation is hazarded, not the entire public credit. (Sargent County v. State, 47 N.D. 561). On the other hand, Mr. Justice Story thought just the opposite. (Briscoe v. Bank of the Commonwealth of Kentucky, 11 Peters 257, US 1827).

Thus, the CIA corporation can sue and be sued independent of explicit authority. To this extent, the rights and obligations of the corporation are determined by the law of the state of incorporation.

D. Dual Compensation Prohibitions - If CIA corporations are not exempt from government-wide restrictions under a broad theory of immunity, then it seems that the dual compensation restrictions apply to CIA corporation employees. These restrictions are:

1. Fifteen officers retired for longevity or disability not incurred in line of duty may be appointed under Public Law 53 but they must waive their retirement pay.

2. Otherwise CIA may appoint only the following retired military persons as regular employees:

   a. Enlisted men retired for any cause. They may receive both CIA and retirement pay.
   b. Officers retired for any disability incurred in war or explosion of an instrumentality of war in line of duty. These persons may receive both CIA and retirement pay.
   c. Officers retired for disability incurred in line of duty. These persons must elect to take either the CIA or the retirement pay.

3. Any number of retired officers retired for any cause may be appointed as consultants on a fee basis if their appointments are intermittent.

V. Application of Section 116, I.R.C.

A. Section 116 of the Internal Revenue Code grants a general exemption from income tax to citizens of the United States residing abroad for a specified period and receiving wages from sources outside the United States. An exception to this exemption is made of "amounts paid by the United States or any agency thereof." CIA corporation employees will often come within the exemption of Section 116 if the exception does not apply to them.

Security does not necessitate that witting CIA corporate employees be granted the §116 tax exemption. They can, as at present, disclose the amount of their income to the Bureau of Internal Revenue and the fact that it did not accrue to them from sources outside the United States without disclosing intelligence sources.

However, the problem is more difficult in the case of unwitting CIA corporate employees. If the Bureau of Internal Revenue will not delegate its audit function to any agency, it will not allow an agency to compute an employee's tax and pay it in a lump sum to the Bureau. CIA is then prevented by this attitude from paying the tax due from all their unwitting employees in a lump sum to the Bureau. The International Bank for Reconstruction and Development (and eight other U.N. type bodies) has developed a plan in accord with the Bureau whereby these agencies pay the tax due from their employees and the Bureau does not consider the tax paid as additional income. If a similar arrangement is developed by the CIA and the Bureau, the CIA may pay the income tax due from their unwitting employees to the bureau and solve one problem. There is also a general formula by which an organization can pay an employee's tax without having this tax payment assessed by the Bureau as additional income. If the net income desired to accrue to the employee is $10,000, and if the tax on $12,500 income to this person would be $2,500, then the employer may pay the employee $10,000 net income and consider the $2,500 as tax which it withholds and pays to the Bureau. This might aid the Agency in its payment of unwitting employees' tax but for the general requirement that persons subject to tax personally file and sign their returns. However, this method may be invoked in the case of unwitting employees through an accord with the Bureau which would waive the requirement of personal filing in the case of unwitting CIA employees. The key argument for payment by CIA of their unwitting employees' tax (where Section 116 applies) is that these persons will never pay their tax unless it is done in this way. The persons are unwitting, and even if they ever become witting, the Bureau will not know of it. The Bureau may argue that it is entirely capable of uncovering tax evasions. However, CIA may well admit that it will almost guarantee that these persons--even after becoming witting--will not be discovered by the Bureau.

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B. Even if the CIA corporation be considered for some purposes a separate entity and not a part of government, still for the purpose of the Section 116 exception to the exemption, it cannot be considered so. (Without broad immunity for CIA corporations) A recent tax court decision extends the Section 116 exception to persons other than employees of the United States Government. Leif J. Sverdrup v. Commission, 14 T.C. 859, (1950). The taxpayer in this case, a citizen of the United States, was a bona fide non-resident of the United States for more than six months. During the taxable year 1942, as a member of an engineering partnership, he received

a sum of money representing his distributable share of the partnership's net income derived from four contracts which the partnership entered into with the United States. The tax court held that the taxpayer was not entitled to the exemption provided by section 116(A) for the reason that the amounts received were within the exception. The court did not restrict the meaning of the parenthetical exception to employees of the United States. The court said:

> "It is significant that the words actually adopted in the amendment were broad. Neither the word 'employee' nor the word 'compensation' was used. Instead, the amendment as passed reads: 'except amounts paid by the United States or any agency thereof' (italics supplied) since the sum of $36,279.30 here in question was such an amount, we hold that respondent properly determined that that amount was not excludable from petitioner's gross income for 1942."

Thus, even if the CIA corporation be considered an independent contractor, the Section 116 exception will still apply to its employees.

C. For these reasons, the argument that the CIA corporation is basically different from an ordinary wholly-owned government corporation has no application. Even if the CIA corporation be considered a legal personality separate from the U. S. Government for purposes of Section 116, Internal Revenue Code, its employees under the Sverdrup case would still be subject to tax.

Federal Employees' Compensation Act, P. L. 267

The Federal Employees Compensation Act defines employees so as to include "all civil officers and employees of all branches of the Government of the United States (including officers and employees of instrumentalities of the United States fully owned by the United States," Section 40(b)1, P. L. 267. Benefits under the Act cannot be waived by agreement between an employer and an employee otherwise covered (20 Code of Fed. Regs. 1.23).

However, this broad statement of coverage does not apply to every person receiving wages from the Government. In 34 Op. Atty. Gen 120, March 11, 1924, the benefits of the Act were held not to apply to seamen working on vessels of the United States Shipping Board Emergency Fleet Corporation, a wholly-owned Government corporation. In that case the seamen signed on board ship by agreement with the master of the vessel with shom they had the employer-employee relationship. The master had signed a contract titled, "United States Shipping Board represented by United States Shipping Board Emergency Fleet Corporation." The contract itself ran "between United States of America, acting through United States Shipping Board, represented by United States Shipping Board Emergency Fleet Corporation, hereinafter called the corporation, and _____ hereinafter called the agent...." This

contract provides that the agent is to man, equip, victual, and supply the vessels; he is to manage, operate, and conduct their business in accordance with the directions, orders, and regulations of the corporation.

The Attorney General emphasized that the agent "employs the seaman, manages, governs, controls, pays, and discharges them; that their only connection with the Fleet Corporation and the United States is that they serve on board vessels owned by the United States or the corporation and controlled by the corporation and are paid out of funds the legal title to which is in the corporation with an ultimate right in the United States, which funds, because of losses in the business, the United States supplements from time to time by appropriations from the Treasury."

The contract described the rights and duties created by it as flowing from the agent to the corporation and, thus, the Attorney General held that the seamen were not direct employees of the United States Government and were not covered by the Federal Employees Compensation Act.

After this opinion of the Attorney General, the United States Shipping Board revised their agency agreements and in 34 Op. Atty. Gen. 363, January 17, 1925, under the new agreements, the seamen employed on United States Shipping Board vessels were held to be covered by the Federal Employees Compensation Act.

The Attorney General pointed out that: "The present form of agreement is 'between the United States of America, hereinafter designated as owner, acting through the United States Shipping Board Emergency Fleet Corporation.' The word 'owner' is substituted for the word 'corporation' throughout the new agreement."

Thus the Attorney General seemed to be of the opinion that the master-agency agreement governed the rights of the employees of the master. However, 34 Op. Atty. Gen. 363, January 17, 1925, explicitly overruled 34 Op. Atty. Gen. 120, March 11, 1924, to the extent that it conflicted with the latter opinion. Thus even if 34 Op. Atty. Gen. 120, is followed, and I have never found it cited, then all employees whose rights stem from the CIA corporation would be covered by the Federal Employees' Compensation Act unless an intermediate personality contracted with the employee under the terms of the first USSBEF Corp. agency contract. If an unwitting or witting employee contracts with a person who takes his authority from the corporation, then he is not covered if his direct employer, that is the agent, takes his authority only from the corporation and not from the United States of America. The key to the problem seems to be whether the relation is between the direct employer and the corporation (in which case the indirect employee is not covered) or with the United States Government (in which case the indirect employee is covered). There seems to be no question that the agent or master of the vessel under the first opinion of the Attorney General cited was something less than an independent contractor and so agency principles seem not to be of paramount importance.

The legislative history of the Urgent Deficiencies Act of December 24, 1919, Chapter 17, 41 Statutes at Large 377, might be significant. The Act "provided that the compensation heretofore or hereafter paid by the United States Shipping Board Emergency Fleet to or on account of employees' disability or death resulting from injuries shall be paid in full satisfaction of the claims of such employee or their legal representatives against the United States."

59 Congressional Record, Part 1, Chapter 854 records this statement: "Mr. Good: 'Unless the matter is absolutely understood and provided for in some such way, we stand a fair show of paying for those injuries twice, once by the Shipping Board Emergency Fleet and another time by the Compensation Commission.'" Thus in 1919, it was thought that the indirect employee of the United States Shipping Board Emergency Fleet Corporation was covered by the Federal Employees' Compensation Act, and in spite of this legislative history, the Attorney General decided that an agency contract could limit liability of a government corporation under the Federal Employees Compensation Act. This was not in the nature of an express waiver of a right by the indirect employee but rather it was the creation of a relation that was not an employer-employee relation under the Act. 20 Code of Fed Regs. 1.23, prohibiting a requirement of waiver of EEC benefits, applies where a relationship is created coming within the employee definition under Section 40(b)1 of the Federal Employees Compensation Act, and the employer intends to require his employee (otherwise coming within Section 40(b)) to waive his right. This is not allowed but the Government corporation seems to be able to go back one step further and, by an agency agreement with the direct employer of the person seeking the benefits of the Federal Employees' Compensation Act, to limit its liability under the Act.

Thus, under the above two Attorney General opinions, CIA corporation employees in some cases may not be covered by the Federal Employees' Compensation Act. The obvious application of these opinions would be to seamen employed by a CIA shipping corporation. The opinions would also apply where a hiring officer took his authority from the corporation rather than the United States Government. It would also seem necessary for the hiring officer to have the broad authority that the master has over his seamen. It should be noted that the employment contracts of seamen run between the master and the seamen. The crew agrees "to be obedient to the lawful commands of this said master, or of any person who shall lawfully succeed him, and of their superior officers in everything relating to the vessel and the stores and cargo thereof, whether on board, in boats, or on shore;...the said master thereby agrees to pay the said crew...and to supply them with provisions according to the annexed scale." (R.S. Section 4612; Acts June 7, 1872, Chapter 322, Sections 65, 68, 17 Stat. 277; December 21, 1898, Chapter 28, Section 23, 30 Stat 762.

It is highly probable that neither of these two cited opinions has any significance today. Under the two cited opinions of the Attorney General coverage under the Federal Employees' Compensation Act depends upon whether or not the master is directly obligated to the United States Government or

indirectly obligated to the United States Government through the wholly-owned government corporations. A more reasonable rule might depend upon the status of the master. Thus, if the master is an independent contractor, or very similar to an independent contractor, the persons he hires would be covered by the Federal Employees' Compensation Act. These opinions, because they do not rest upon any ordinary principle of the law of the Agency, might not be followed at the present time.

The Comptroller General, in a letter to this Agency disallowing retroactive pay increases, stated that the extraordinary authority granted to CIA does not apply "to the normal administrative or operating problems which confront the ordinary agency." B-106516, November 21, 1951.

The criteria of the Comptroller General do not seem to depend upon the type of person involved or the kind of work he is doing. However, the problems of this Agency--including all the corporate problems--involve restrictions that apply to all Government agencies. Unless the security factor or the nature of a particular class of situations are considered sufficient to change otherwise normal administrative or operating problems to problems in which the broad CIA authority applies, then all the problems of CIA come within the broad language of the Comptroller General as normal or ordinary administrative problems.

The problem of unwitting employees is a peculiar CIA corporation problem. Assuming that there is no broad exemption for CIA from government-wide restrictions, the unwitting CIA employees are liable for their income tax under Section 116 and the exemption for foreign residents does not apply. Even if the problem of the unwitting employee is considered an abnormal one still it would seem necessary to have an accord with the Bureau of Internal Revenue before CIA could pay their unwitting employees' tax. The Bureau might argue that this kind of an arrangement requires authority of a higher dignity than a confidential accord. But the Bureau, it seems, delegated some of its authority to the International Bank for Reconstruction and Development (and eight other U.N.-type bodies) in a recent confidential arrangement. (See P. of this paper)

The Federal Employees' Compensation Act, even in the case of the unwitting employee, seems to involve the normal administrative or operating problem. Extensive potential liability is assumed by the United States Government in proportion to CIA recruitment. Where the act applies this would seem not to be an abnormal problem under the Comptroller General's letter.

FOIAB5

The dual compensation prohibition also, as an ordinary impediment to recruitment, is a normal administrative problem.

OGC

FOIAB5

OGC

VOX POPULI: The Highest Law

The concept of a government agency acting beyond congressional control is repugnant to the basic American tradition. Congress and the electorate have but few checks on the workings of administrative agencies. Sporadic congressional investigations and columnists' campaigns--exposing gross inefficiencies, corruption, and even illegal actions--result in either a limitation of appropriation to the agency or an outright shift in functions to another agency. Incidentally, all persons even indirectly associated with the corruption, gross inefficiencies, and/or illegal actions, are considered assassins of government. The fact that administrators are doing what they consider to be in the best interests of the nation is hardly an argument that can be validly presented in the face of outraged public opinion.

Thus--even if CIA has very broad authority--it should not be exercised merely to make "administration easier." Each employee of government is in a position of trust as a guardian of the treasury. CIA is also a guardian of national security, but this stewardship must be conducted as economically as possible.

An extensive network of laws and regulations enmesh each government employee, and this should be followed unless it is opposed to the mission of CIA. In the past, CIA has often found itself opposed to explicit statutory schemes, and by administrative accords (like the possible CIA-Bureau of Internal Revenue inter-agency accord) has sometimes solved these problems.

Thus, the Immigration officials have allowed an alien leaving the United States to secure a reentry permit in an assumed name. The Immigration service has also permitted CIA employed aliens to secure American citizenship on a certification that the American wife of the individual is employed by this Agency, and is to be stationed abroad.

This attitude of "bending" by the Executive to meet the needs of CIA should be utilized in preference to any broad exemption of CIA activities--especially corporate--from government-wide restrictions. Reason: this is the arrangement most likely acceptable to potential congressional investigators of CIA activities.

25X1

OGC/AL:imm

Allen Weiner

Yours,

For our

"Passage" file.

UNCLASSIFIED RESTRICTED CONFIDENTIAL SECRET
(SENDER WILL CIRCLE CLASSIFICATION TOP AND BOTTOM)

CENTRAL INTELLIGENCE AGENCY

OFFICIAL ROUTING SLIP

25X1

TO		INITIALS	DATE
1	[redacted]		
2			
3			
4			
5			
FROM		INITIALS	DATE
1	L. R. Houston	LRH/mls	9 Jun 52
2			
3			

[ ] APPROVAL	[X] INFORMATION	[ ] SIGNATURE
[ ] ACTION	[ ] DIRECT REPLY	[X] RETURN
[ ] COMMENT	[ ] PREPARATION OF REPLY	[ ] DISPATCH
[ ] CONCURRENCE	[ ] RECOMMENDATION	[ ] FILE

REMARKS:

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